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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

LESLIE BUCK, Plaintiff and Respondent, v. WILLIAM M. BROOKS et al., Defendants and Appellants.	A142929 (Alameda County Super. Ct. No. HG-12-659852)

This is an appeal from post-judgment orders granting the motion to tax costs filed by plaintiff Leslie Buck and denying the motion for attorney fees and expenses filed by defendants William M. Brooks and ESC Partners, L.P. (collectively, defendants) following plaintiff's voluntary dismissal of this action without prejudice. For reasons set forth below, we affirm the order denying defendants' motion for attorney fees and expenses, and reverse the order granting plaintiff's motion to tax costs with remand instructions.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant ESC Partners, L.P., is a California limited partnership formed in 1991 and headquartered in San Leandro (hereinafter, partnership). The sole asset of the partnership is the 29,000 square-foot Estudillo Shopping Center in San Leandro. Defendant Brooks has been the partnership's sole general partner since 1991, while plaintiff is one of several limited partners, all of whom belong to either the Brooks family (like defendant) or the Patterson family (like plaintiff). Plaintiff, in her own name, owns

22.6 percent of the Patterson family's 39 percent interest in the partnership. In addition, plaintiff owns one third of the WDP Trust, which, in turn, owns a 16 percent interest in the partnership.

Both defendant Brooks and plaintiff are signatories to the ESC Partners Limited Partnership Agreement (Partnership Agreement). Among other things, the partnership agreement includes an attorney fee provision, which mandates that the "prevailing party" in any action concerning partnership affairs between or among one or more partners and/or the partnership itself shall recover from the non-prevailing party or parties "costs and reasonable attorneys' fees incurred by the prevailing party or parties in prosecuting or defending the action."

On December 4, 2012, plaintiff filed a complaint in Alameda County Superior Court against defendants to compel inspection of partnership records and documents; dissolution of the partnership; and an accounting of partnership income, expenses and distributions; and alleging breach of fiduciary duty by Brooks in his capacity as general partner.[1] On January 31, 2013, plaintiff then filed a first amended complaint, asserting essentially the same causes of action.

According to this complaint, in 2011, plaintiff sought to exercise her right as a limited partner to view certain financial records and documents of the partnership as part of her effort to find a potential buyer for her partnership interest. However, Brooks, in response to plaintiff's request, advised that she would need to post a cash bond of $5,000 in order to inspect these records, a violation of his fiduciary duties as well as the Partnership Agreement.

Subsequently, on or about November 16, 2012, plaintiff made a written request to Brooks to inspect the partnership's monthly bank account statements in order to confirm that the partnership's reserve accounts were being properly maintained. In this letter, plaintiff advised Brooks of her desire to undertake this inspection on December 7, 2012

[1] While plaintiff informed Brooks in writing on November 30, 2012, that her complaint would be forthcoming, defendants were not in fact served with a copy of the December 4, 2012 complaint.

and that, under the Corporations Code, his response was required within 10 days. According to the complaint, plaintiff never received a response.

In addition to refusing to allow access to appropriate financial records, the complaint further alleged that Brooks had fraudulently manipulated the cash distributions due the limited partners by withholding distributions based on the untruth that the partnership needed a reserve to pay for future renovations and seismic upgrades at the shopping center.[2] According to the complaint, despite withholding these distributions, "Defendant has undertaken no act to further remodeling for any purpose." At the same time, it alleged that Brooks sought to purchase plaintiff's interest in the partnership "for the amount of her money being held in the reserve account, together with payments equal to the distributions her interest would be paid over the next 10 years. Put another way, Defendant offered to buy Plaintiff's interest with no money but her own."

The complaint also asserted that, when plaintiff began working with a realtor to help sell her partnership interest, defendant refused to cooperate or to share pertinent information for potential buyers. Finally, the complaint alleged that Brooks had failed to properly account for the interest earned (or the interest that should have been earned) on the partnership's reserve accounts.[3]

Based upon these acts and omissions, the complaint asserted that Brooks had breached his fiduciary duty and abused his authority as general partner, such that the following relief was necessary: an accounting of partnership income, expenses and

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[2] According to later-produced evidence, in September 2012, Brooks notified the limited partners that, due to safety concerns, seismic upgrades planned for the future would have to be undertaken much sooner than anticipated. As such, Brooks advised that he did not believe it would be prudent to make any tax-related distributions for the limited partners for tax year 2012.

[3] According to later-produced evidence, in October 2011, Brooks followed advice he received from the partnership's bankers at Wells Fargo by moving the partnership's reserve accounts from interest-bearing accounts to non-interest bearing accounts due to market conditions (to wit, extremely low interest rates) and to the fact that the interest-bearing accounts (unlike the non-interest bearing accounts) were not federally insured. As will be discussed below, Brooks returned the partnership's reserve accounts to interest-bearing accounts in January 2013. (Pp. 13-14, *post*.)

distributions, dissolution of the partnership and winding up of its affairs, appointment of a receiver, and payment of damages, reasonable attorney fees and other costs.

In May 2013, plaintiff filed a motion for appointment of receiver or, in the alternative, preliminary injunctive relief, seeking, among other things, an order to dissolve the partnership and appoint a neutral receiver and to compel distribution of cash profits to the limited partners. This motion was denied after hearing on May 16, 2013. In denying the motion, the trial court found plaintiff had failed to establish that, under the circumstances, "it is not reasonably practical to carry on the activities of the limited partnership in conformity with the partnership agreement." In particular, the court noted that the evidence was undisputed that the Estudillo Shopping Center had been "consistently profitable" under Brooks' control and that, by plaintiff's own admission, since the filing of the complaint, defendants had voluntarily undertaken many of the measures she sought to require him to do in her motion.

After defendants successfully demurred to the first amended complaint, plaintiff filed a second amended complaint on or about September 16, 2013.[4] Defendants again demurred or, in the alternative, moved to strike portions of this pleading. Rather than oppose this demurrer, plaintiff filed a voluntary dismissal of her lawsuit without prejudice on December 16, 2013. A few days later, on December 19, the court entered a judgment of dismissal in favor of defendants.

On January 16, 2014, defendants filed their first amended memorandum of costs and worksheet and, on February 14, 2014, filed a motion to recover attorney fees and expenses. Plaintiff, in turn, filed a motion to tax costs on February 3, 2014.

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[4] Plaintiff failed to oppose defendants' demurrer or, alternatively, motion to strike portions of the first amended complaint, and the trial court thus sustained the demurrer without leave to amend and entered a dismissal in defendants' favor. However, plaintiff then filed a motion for relief from default seeking to vacate the dismissal of her case. Over defendants' opposition, the trial court granted plaintiff's motion to set aside the dismissal and granted defendants' request for reimbursement of fees and costs. Plaintiff thereafter filed her second amended complaint.

Following a July 9, 2014 hearing on both motions, the trial court granted plaintiff's motion to tax costs, and then denied defendants' motion for attorney fees and expenses. In doing so, the court found defendants were not the "prevailing parties" in this litigation and, thus, based upon "equitable principles," were not entitled to recover attorney fees and expenses or other litigation costs. In reaching this decision, the trial court noted that plaintiff had obtained much of what she sought to accomplish with her lawsuit prior to its voluntary dismissal, including the reinstitution of profit distributions in 2012 and 2013, the depositing of partnership funds in an interest-bearing account, and an inspection of partnership documents. Following entry of these post-judgment rulings, defendants filed a timely notice of appeal.

DISCUSSION

Defendants contend on appeal that the trial court erred in granting plaintiff's motion to tax costs and denying their motion for attorney fees and costs. Defendants reason that, contrary to the trial court's finding, they, not plaintiff, were the "prevailing parties" in this litigation. As such, defendants contend they are entitled to costs, including attorney fees and expenses, pursuant to the Partnership Agreement and Civil Code section 1717. In addition, in a related argument, defendants insist they are entitled to all costs they have claimed, including the costs they incurred to photocopy nearly seven boxes of partnership records in anticipation of the trial that did not ultimately go forward. Defendants thus ask us to vacate the trial court's orders of July 10, 2014, and enter new orders denying plaintiff's motion to tax costs and granting their motion for attorney fees and expenses. In addition, defendants ask that we award them costs and attorney fees and expenses on appeal, and to remand to the trial court for a hearing to determine the appropriate amounts.

The governing law for purposes of this appeal is as follows. A prevailing party in an action or proceeding is generally entitled to recover costs. (Code of Civ. Proc.,

§ 1032, subd. (b).)[5] For purposes of this particular statute, " 'Prevailing party' includes . . . a defendant in whose favor a dismissal is entered . . . . When any party recovers other than monetary relief *and in situations other than as specified*, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034." (§ 1032, subd. (a)(4) (italics added).)

With respect to attorney fees and expenses, section 1033.5, subdivision (a)(10), provides that these items are "allowable as costs under Section 1032" when "authorized by" contract, statute, or law. Thus, in other words, recoverable litigation costs may include attorney fees and expenses, but only when the party entitled to costs has a legal basis, independent of the cost statutes and grounded in an agreement, statute, or other law, upon which to claim recovery of such fees and expenses. (E.g., *Santiśas v. Goodin* (1998) 17 Cal.4th 599, 608 [" 'parties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract' "] (*Santiśas*).)

On appeal, the trial court's determination as to which party "prevailed" for purposes of an award of attorney fees is reviewed only for abuse of discretion. (*Salehi v. Surfside III Condominium Owners' Assn*. (2011) 200 Cal.App.4th 1146, 1154 (*Salehi*); see also *Carver v. Chevron USA, Inc*. (2002) 97 Cal.App.4th 132, 142.) In this context, " ' "discretion is abused whenever . . . the court exceeds the bounds of reason, all of the circumstances before it being considered." [Citation.]' [Citation.] 'In deciding whether the trial court abused its discretion, "[w]e are . . . bound . . . by the substantial evidence rule. [Citations.] . . . The judgment of the trial court is presumed correct; all intendments and presumptions are indulged to support the judgment; conflicts in the declarations must be resolved in favor of the prevailing party, and the trial court's resolution of any factual

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[5] Unless otherwise stated, all statutory citations herein are to the Code of Civil Procedure.

disputes arising from the evidence is conclusive. [Citations.]" [Citation.] We presume the court found in [the prevailing party's] favor on all disputed factual issues. [Citation.]' [Citation.]" (*Salehi, supra*, at p. 1154.)

I. Litigation Costs Generally.

Returning to the case at hand, we first address whether the trial court was correct to grant plaintiff's motion to tax costs. On this issue, we agree with defendants that, based upon the California Supreme Court's decision in *Santiśas*, they, not plaintiff, are entitled to recover litigation costs as a matter of right under section 1032:

"For the purpose of determining entitlement to recover costs, Code of Civil Procedure section 1032 defines 'prevailing party' as including, among others, 'a defendant in whose favor a dismissal is entered.' (. . . § 1032, subd. (a)(4).) [¶] Because plaintiffs voluntarily dismissed this action with prejudice, the seller defendants are defendants in whose favor a dismissal has been entered. Accordingly, they are 'prevailing parties' within the meaning of . . . section 1032, subdivision (b), and are 'entitled as a matter of right to recover costs' unless another statute expressly provides otherwise. Plaintiffs have not called to our attention, nor are we aware of, any statute that would preclude a cost award to the seller defendants in this action." (*Santiśas, supra*, 17 Cal.4th at p. 609.)

The same circumstances exist here – to wit, plaintiff voluntarily dismissed her action, making defendants the "prevailing party" for purposes of section 1032, and plaintiff has identified no statute, and nor are we aware of any statute, precluding their recovery of costs as such. (*Santiśas, supra*, 17 Cal.4th at p. 606.) We therefore conclude the trial court erred in granting plaintiff's motion to tax costs.[6]

However, as the California Supreme Court was quick to recognize, having determined defendants are, as a matter of law, entitled to recover their costs in this litigation, the question remains whether the costs they may recover include the amounts

[6] Plaintiff implicitly concedes this point by offering no reasoned argument to the contrary.

they have incurred as attorney fees in defending this litigation. (*Santiśas, supra*, 17 Cal.4th at p. 606.) To this issue we now turn.

II. Attorney Fees and Expenses.

Defendants claim a right to recover attorney fees and expenses as the "prevailing parties" in this litigation pursuant to the Partnership Agreement executed by both parties. The relevant provision is as follows:

"13.9 Attorneys' Fees. If in any action between or among any partners, Unit Holders and/or the Partnership is brought to enforce, interpret or defend this Agreement or any other matter pertaining to the Partnership or its affairs, the prevailing party or parties shall be entitled to recover from the non-prevailing party or parties costs and reasonable attorneys' fees incurred by the prevailing party or parties in prosecuting or defending the action, including costs and fees incurred in any appeal therefore or in any bankruptcy action."

According to defendants, they must be deemed the prevailing parties within the meaning of the Partnership Agreement because plaintiff voluntarily dismissed her case against them prior to trial. The Partnership Agreement itself does not define the term "prevailing party or parties." However, defendants rely upon *Santiśas*, a case, like this one, involving a request for an award of contractual attorney fees where the plaintiff voluntarily dismissed the action prior to trial, in which, as explained above, the California Supreme Court recognized that, "for purposes of the cost statutes, this term includes a party in whose favor a judgment of dismissal has been entered. (. . . § 1032, subd. (a)(4).)" (*Santiśas, supra*, 17 Cal.4th at p. 621.)

However, as we just finished explaining, a party that "prevails" for purposes of section 1032 does not necessarily prevail for purposes of a contractual right to attorney fees. To the contrary, as the California Supreme Court clarified in *Santiśas*: "[A]ttorney fees should not be awarded *automatically* to parties in whose favor a voluntary dismissal has been entered. In particular, it seems inaccurate to characterize the defendant as the 'prevailing party' if the plaintiff dismissed the action only after obtaining, by means of settlement or otherwise, all or most of the requested relief, or if the plaintiff dismissed for

reasons . . . that have nothing to do with the probability of success on the merits. . . . If . . . the contract allows the prevailing party to recover attorney fees but does not define 'prevailing party' or expressly either authorize or bar recovery of attorney fees in the event an action is dismissed, a court may base its attorney fees decision on a pragmatic definition of the extent to which each party has realized its litigation objectives, whether by judgment, settlement, or otherwise. [Citation.]" (*Santišas*, *supra*, 17 Cal.4th at pp. 621-622.) Thus, whether a party qualifies as the "prevailing party" for purposes of recovering attorney fees and expenses as costs is left to the trial court's reasoned judgment, and is reversed on appeal only upon a showing that the court "exceed[ed] the bounds of reason." (*Salehi, supra*, 200 Cal.App.4th at p. 1154.)

Here, in rejecting defendants' motion for an award of attorney fees and expenses, the trial court reasoned: "Plaintiff has sufficiently established that she did not dismiss her action because it was shown to lack merit, as the plaintiffs did in *Santišas*, but because she had obtained much of what she intended to obtain through Defendants' actions taken after the lawsuit was filed on December 4, 2012. Defendants themselves described the decisions taken by Defendant Brooks, such as the reinstitution of profit distributions in 2012 and 2013, the depositing of partnership funds in an interest-bearing account, and his allowance of an inspection of partnership documents by plaintiff and her attorney, in their opposition to the Motion for Appointment of Receiver and Motion for Preliminary Injunction." Having reviewed the record at hand, we conclude the trial court's ruling is amply supported by the evidence and well within the bounds of reason. As such, we decline to reverse on appeal. (See *Salehi, supra*, 200 Cal.App.4th at p. 1154.)

In particular, we agree with the trial court that defendants cannot be deemed the prevailing parties for purposes of recovering attorney fees and expenses under the Partnership Agreement given plaintiff's success in achieving her primary litigation objectives, notwithstanding her decision to voluntarily dismiss the case prior to trial without prejudice. These objectives, as her complaint reflects, include effectively ending defendant Brook's ongoing "abuse of authority" in failing to disclose and permit inspection of partnership financial records and documents, failing to make regular cash

distributions to the partnership, and failing to account for interest earned (if any) on the partnership's reserve accounts. And, while the litigation ended in voluntary pretrial dismissal, as in *Santiśas*, this result was not because plaintiff's claims lacked merit. To the contrary, she was able to obtain a significant portion of the relief she sought by other means – mainly, defendants' voluntary actions after she filed her complaint that ultimately rendered trial unnecessary.

In so concluding, we first reject defendants' more general argument that plaintiff cannot be deemed the prevailing party because she failed to accomplish all of the objectives identified in her complaint or subsequent motion for appointment of receiver, including, for example, dissolution of the partnership, removal of defendant Brooks as general partner, and a court order for an accounting. The law, as previously set forth, gives the trial court broad discretion to decide whether a party prevailed for purposes of a contractual right to recover attorney fees based upon an ordinary or commonsense meaning of the term. (See *Santiśas*, *supra*, 17 Cal.4th at p. 609 ["Because 'prevailing party' has no settled technical meaning as including or excluding a party in whose favor a dismissal has been entered, we will assume, in the absence of evidence to the contrary, that the parties understood the term in its ordinary or popular sense"].) Thus, contrary to defendants' suggestion, achievement of all stated litigation goals is not the standard. And, in this case, we agree with the trial court that plaintiff accomplished enough of her primary objectives in initiating this lawsuit, such that the trial court cannot be said to have "exceed[ed] the bounds of reason" in designating her the prevailing party for the purpose of the Partnership Agreement's attorney fee provision. (See *Salehi, supra,* 200 Cal.App.4th at p. 1154.)

For example, the record confirms that plaintiff was denied access to partnership records and books for many years, despite her repeated requests to inspect them, until December 10, 2012, several days after her original complaint was filed. Specifically, documentary evidence demonstrates that, as far back as 2004, plaintiff, desiring to sell her partnership interest and needing information to valuate her interest, requested from defendant Brooks, but was denied, access to relevant business information such as the

current appraisal of the shopping center and the lease terms of its tenants.[7] Following Brooks' denials of access, plaintiff hired an attorney to assist her. This attorney then sent Brooks a demand letter on November 30, 2012, warning that plaintiff intended to, forthwith, file a complaint if certain demands were not met, including gaining access to partnership records. And, when Brooks failed to grant her this access, plaintiff did in fact file her complaint on December 4, 2012. It was not until afterward that defendants' attorney reversed course and advised plaintiff's attorney on December 10, 2012, that "Matt Brooks will make available to your client, you, or her accountant for examination and copying . . . . whatever ESC Partnership records you wish to examine."

When later moving for attorney fees and expenses, defendant denied that plaintiff's lawsuit triggered his agreement to provide access to the partnership records. In doing so, defendant relied upon the following facts set forth in a declaration submitted by his attorney. Specifically, defense counsel attests that, after receiving plaintiff's November 30, 2012 demand letter, he asked for a seven-to-ten-day extension to respond to give him more time to investigate her allegations. However, defense counsel states, he never received a response to this extension request and Brooks was never properly served with the original complaint. Nonetheless, on December 5, 2012, defense counsel sent a letter to plaintiff's counsel refuting several allegations in the demand letter and, two days later, on December 7, he agreed by telephone to certain of her demands, including access to partnership records. These agreements were then memorialized in a letter mailed December 10, 2012 and, on January 24, 2013, plaintiff actually had the opportunity to view the records. On appeal, defendants insist this evidence undermines the trial court's finding that plaintiff prevailed on this issue.

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[7] In one such instance, defendant Brooks advised plaintiff that she would need to pay a $5,000 deposit in order to get access to these records, despite the fact that, as a limited partner, plaintiff had an express right under the Partnership Agreement, as well as a statutory right under the Corporations Code, to inspect and copy most records during reasonable business hours and at her expense. (See Corp. Code, § 15903.04.)

We, however, fail to grasp how this evidence, properly viewed, undermines the trial court's finding. (See *Salehi, supra*, 200 Cal.App.4th at p. 1154 ["all intendments and presumptions are indulged to support the judgment; conflicts in the declarations must be resolved in favor of the prevailing party, and the trial court's resolution of any factual disputes arising from the evidence is conclusive"].) As mentioned above, plaintiff's November 30, 2012 demand letter warned that a complaint would be filed "within seven days" of this letter unless defendant Brooks met certain of her demands. Of course, plaintiff's complaint was filed just five days later. However, given that plaintiff had been seeking access to partnership records since as early as 2004, the fact that she proceeded with her lawsuit without granting defendant's request for an extension to respond to her letter does not necessarily call into question the trial court's finding that it was her lawsuit that triggered defendant's belated decision to grant access.

Moreover, the trial court made another finding supportive of its ruling on defendants' attorney fee motion that was likewise grounded in the record – to wit, that plaintiff's initiation of this lawsuit prompted defendant Brooks to reinstate profit distributions to the limited partners after several years of declining to do so. According to the record, Brooks repeatedly told the limited partners between 2010 and 2012 they would not receive their yearly cash distribution from partnership profits because the partnership had to set aside funds to pay for badly-needed remodeling and seismic upgrades to the shopping center. Specifically, Brooks announced the withholding of distributions in October 2010, and thereafter advised plaintiff that the withholding would likely last "several years." Brooks then repeated this assertion several times, including in a November 1, 2012 letter in which he advised the limited partners: "I do not expect any distributions from this partnership for several years. The partnership produces approximately $400,000 per year and needs to reserve more than $1,000,000 in additional funds for the needed schedule of work." And, rather than reversing course on this issue, Brooks' attorney, in his post-complaint December 5, 2012 letter to plaintiff's attorney, expressly denied that Brooks had manipulated cash distributions and reiterated the need for the partnership to put aside funds for the remodeling and seismic work, warning: "[It

is] not for [plaintiff] to second-guess this choice by the General Partner made in the exercise of his sound business and managerial discretion."[8] Nonetheless, at some point after his attorney's post-demand letter, post-complaint communication of December 5, 2012, Brooks relented, acknowledging that "he had been incorrect in [his] fears that ESC needed immediate seismic work . . . [and that] end-of the-year taxable income distributions would, in fact, go forward."

As defendants point out on appeal, when moving for attorney fees and expenses and opposing plaintiff's motion to tax costs, Brooks submitted his own declaration in which he asserts that his realization that seismic upgrades were not urgent and his subsequent decision to reinstate end-of-year partner distributions were made *before* plaintiff's lawsuit was initiated. However, it is clear the trial court implicitly rejected this evidence when it found that plaintiff's lawsuit did in fact trigger defendant's actions in this regard. Given the substantial evidence described above that supports the trial court's finding, there is no basis to disturb it on appeal. (*Salehi, supra*, 200 Cal.App.4th at p. 1154.)

Finally, we turn to the third finding made by the trial court in ruling against defendants – that Brooks refused to move partnership funds out of non-interest bearing accounts, despite plaintiff's protestations, until she sent her November 30, 2012 demand letter and initiated this lawsuit on December 4, 2012. According to the record, in late 2011 Brooks informed the limited partners that he was moving partnership funds from interest bearing accounts to non-interest bearing accounts based on certain market factors (including extremely low interest rates) and on the advice of the partnership's banker. In plaintiff's demand later, she demanded, among other things, an accounting reflecting any interest earned on the partnership's reserve accounts. In her complaint, filed five days later, plaintiff asserted that Brooks had abused his authority by, among other things, failing to account for the interest earned on the partnership's reserve funds. Thereafter,

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[8] Similar statements regarding the continued withholding of partner distributions were then made in a letter from Brooks' attorney dated December 10, 2012.

and subsequent to the December 4 filing of her complaint, Brooks advised the partnership in a letter dated January 11, 2013, that the funds would in fact be returned to interest bearing accounts. While, as before, defendants insist Brooks' reversal of course was based upon the advice of his banker at Wells Fargo and wholly unrelated to this litigation, the trial court had a reasonable basis on this record to reject their assertions and conclude otherwise. The court's finding thus stands. (*Salehi, supra*, 200 Cal.App.4th at p. 1154.)

Accordingly, for the reasons provided, we affirm the trial court's denial of defendants' motion for attorney fees and expenses, including its underlying finding that defendants did not "prevail" for purposes of the Partnership Agreement, notwithstanding plaintiff's voluntary pretrial dismissal of this action without prejudice. (See *Santišas, supra,* 17 Cal.4th at pp. 609, 621 [where a plaintiff dismissed the action only after obtaining, by means of settlement or otherwise, all or most of the requested relief, defendant was not the "prevailing party"].)

And given our conclusion that the trial court properly exercised its discretion to deny defendants' motion, we need not address their ancillary argument that Civil Code section 1717 does not bar their recovery of attorney fees because plaintiff raised claims that were non-contractual in nature. (See Civ. Code, § 1717; *Santišas*, *supra*, 17 Cal.4th at p. 617 ["When a plaintiff files a complaint containing causes of action within the scope of section 1717 (that is, causes of action sounding in contract and based on a contract containing an attorney fee provision), and the plaintiff thereafter voluntarily dismisses the action, section 1717 bars the defendant from recovering attorney fees incurred in defending those causes of action, *even though the contract on its own terms authorizes recovery of those fees*. [¶] This bar, however, applies *only* to causes of action that are based on the contract and are therefore within the scope of section 1717"].)[9] As plaintiff

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[9] Civil Code section 1717 provides in relevant part: "(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded . . . to the prevailing party, then the party who is determined to be the party prevailing on the contract . . . shall be entitled to reasonable attorney's fees in addition to other costs. [¶] (b) . . . [¶] (2) Where an action has been

notes, the trial court did not rely upon this statute to deny defendants' motion; nor was it required to. As such, even assuming for the sake of argument defendants are correct that Civil Code section 1717 provides no legal barrier to *granting* their motion, as the trial court properly found, their motion nonetheless fails on another ground – to wit, their failure to qualify as the prevailing parties under the Partnership Agreement. The distinction made in the case law between contract claims and non-contract claims for purposes of Civil Code section 1717 is, thus, simply not relevant here.[10]

III. Photocopying Costs.

One issue remains. We must consider a specific item of cost unrelated to attorney fees that was requested by defendants pursuant to section 1032, and was challenged by plaintiff – to wit, their claim for $4,913.64 in photocopying costs pursuant to section 1033.5, subdivision (a)(13). This statutory provision, in turn, permits a party to recover costs for "models and enlargements of exhibits, and photocopies of exhibits . . . if they were reasonably helpful to aid the trier of fact."[11] (§ 1033.5, subd. (a)(13).) "Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion. [Citation.] However, because the right to costs is governed strictly by statute [citation] a court has no discretion to award costs not statutorily authorized. [Citations.]" (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 773-774.)

In challenging defendants' recovery of this cost, plaintiff argues that "photocopies that are merely convenient to the preparation and presentation of a party's case are not

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voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section."

[10] Because we have affirmed the trial court's denial of defendants' motion for attorney fees and expenses, we need not address any issue raised on appeal regarding the amount of such fees and expenses incurred by defendants.

[11] As defendants note, plaintiff has raised no objection to their claim identified in their cost memorandum for the following: filing and motion fees ($1,628.35), jury fees ($207.90) or deposition costs ($1,727.77). Accordingly, we agree with defendants that, pursuant to section 1032, these cost items are recoverable.

recoverable as costs" under section 1033.5, subdivision (a)(13). According to plaintiff, there was "simply no need" for defendants to photocopy seven boxes of partnership records for her review, particularly given that the matter never went to trial.

We conclude that, on remand, the trial court should decide in the first instance whether the costs incurred by defendants to photocopy partnership records are recoverable, notwithstanding the fact that plaintiff voluntarily dismissed the case prior to trial. (See *Applegate v. St. Francis Lutheran Church* (1994) 23 Cal.App.4th 361, 364 [whether the "prevailing party" for purposes of the cost statutes could recover costs for exhibits not used at trial where the lawsuit was dismissed on the day of trial was a matter for the trial court's discretion under section 1033.5, subdivision (c)(4), so long as the proper showing was made under subdivision (c)(2) that the item was "reasonably necessary" to the conduct of the litigation].) In this case, the trial court never made this determination after erroneously finding that defendants were not the prevailing parties within the meaning of section 1032. (See pp. 7-8, *ante*.) Nonetheless, given its superior position with respect to the evidence and proceedings below, we conclude the trial court, rather than this court, should first do so.

DISPOSITION

The trial court's order of July 10, 2014, denying defendant's motion for attorney fees and expenses is affirmed. The trial court's order of July 10, 2014, granting plaintiff's motion to tax costs is reversed, and the matter is remanded for consideration of whether defendants are entitled to recover the claimed $4,913.64 in photocopying charges. The parties shall bear their own costs on appeal.

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Pollak, J.